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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 ENCARNACION SALAS, IV,

11 Petitioner,

12 v.

13 WASHINGTON STATE  
14 ATTORNEY GENERAL,

15 Respondent.

CASE NO. C25-0207JLR

ORDER

16 **I. INTRODUCTION**

17 Before the court is the report and recommendation of United States Magistrate  
18 Judge Grady J. Leupold recommending the dismissal of *pro se* petitioner Encarnacion  
19 Salas, IV's 28 U.S.C. § 2254 habeas petition. (R&R (Dkt. # 5); Pet. (Dkt. # 4).) No  
20 objections were filed by the March 24, 2025 deadline. (*See generally* Dkt.) Having  
21 carefully reviewed Magistrate Judge Leupold's report and recommendation, the balance  
22

1 of the record, and the governing law, the court ADOPTS the report and recommendation  
2 and DISMISSES Mr. Salas's petition without prejudice.

## 3 II. BACKGROUND

4 Mr. Salas challenges his 2019 Snohomish County conviction for murder in the  
5 second degree with a deadly weapon. (*See generally* Pet.) Magistrate Judge Leupold  
6 recommends that the court deny Mr. Salas's § 2254 petition without prejudice and deny  
7 the issuance of a certificate of appealability on the grounds that the habeas petition is a  
8 second or successive habeas petition. (*See generally* R&R.)

9 This is Mr. Salas's fourth habeas petition challenging his 2019 state court  
10 conviction. In December 2022, Mr. Salas filed his first habeas petition in the United  
11 States District Court for the Western District of Washington challenging his conviction  
12 on the grounds of double jeopardy. *Salas v. Washington State Attorney General*, C22-  
13 1864BHS-TLF (W.D. Wash.), Dkt. ## 1, 3. Mr. Salas's first petition was dismissed for  
14 failure to exhaust his state court remedies. *Id.*, Dkt. ## 9, 10.

15 In July 2023, Mr. Salas filed a second habeas petition challenging his 2019 state  
16 conviction on the same grounds. *Salas v. Washington State Attorney General*, C23-  
17 1022JNW-TLF (W.D. Wash.), Dkt. ## 1, 5 at 3. He subsequently amended his second  
18 petition to allege claims for "prosecution misconduct" and "failure of due process." *Id.*  
19 at 3.

20 Before he amended his second petition, however, Mr. Salas commenced another  
21 habeas action challenging his 2019 conviction. *See Salas v. Washington State Attorney*  
22 *General*, C23-1118TL-TLF (W.D. Wash.), Dkt. ## 1, 4. Mr. Salas's third petition was

1 dismissed as duplicative of his second petition. *Id.*, Dkt. ## 7, 8. In April 2024, Mr.  
 2 Salas’s amended second petition was dismissed with prejudice as time-barred and for  
 3 lack of personal jurisdiction. *Salas*, C23-1022JNW-TLF, Dkt. ## 25, 26.

4 Finally, on January 28, 2025, Mr. Salas filed the instant § 2254 petition before this  
 5 court. (*See generally* Pet.) Mr. Salas’s instant petition challenges his state conviction  
 6 again on the grounds of double jeopardy. (*Id.* at 5.)

### 7 **III. ANALYSIS**

8 A district court has jurisdiction to review a magistrate judge’s report and  
 9 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). “A judge of the court  
 10 may accept, reject, or modify, in whole or in part, the findings or recommendations made  
 11 by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). “The statute makes it clear that the  
 12 district judge must review the magistrate judge’s findings and recommendations *de novo*  
 13 *if objection is made*, but not otherwise.” *United States v. Reyna-Tapia*, 328 F.3d 1114,  
 14 1121 (9th Cir. 2003) (en banc). Because Mr. Salas is proceeding *pro se*, this court must  
 15 construe his petition liberally. *See Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 925  
 16 (9th Cir. 2003).

17 The Antiterrorism and Effective Death Penalty Act (“AEDPA”) “greatly restricts  
 18 the power of federal courts to award relief to state prisoners who file second or  
 19 successive habeas corpus” petitions. *Tyler v. Cain*, 533 U.S. 656, 661-62 (2001). “A  
 20 habeas petition is second or successive only if it raises claims that were or could have  
 21 been adjudicated on the merits” in an earlier petition. *McNabb v. Yates*, 576 F.3d 1028,  
 22 1029 (9th Cir. 2009). “A disposition is ‘on the merits’ if the district court either

1 considers and rejects the claims or determines that the underlying claim will not be  
2 considered by a federal court.” *McNabb*, 576 F.3d at 1029 (citing *Howard v. Lewis*, 905  
3 F.3d 1318, 1322 (9th Cir. 1990)). For purposes of AEDPA, the dismissal of a § 2254  
4 petition “for failure to comply with the statute of limitations renders subsequent petitions  
5 second or successive.” *Id.* at 1030 (citing 28 U.S.C. § 2244(b)).

6 A petition that is deemed second or successive may not be filed unless the  
7 petitioner obtains an order from the appropriate United States Court of Appeals  
8 authorizing the district court to consider the petition. 28 U.S.C. § 2244(b)(3); *Woods v.*  
9 *Carey*, 525 F.3d 886, 888 (9th Cir. 2008). In the absence of an order authorizing review,  
10 the district court lacks jurisdiction to consider the second or successive petition. *Burton*  
11 *v. Stewart*, 549 U.S. 147, 157 (2007).

12 Here, Mr. Salas’s amended second § 2254 petition was dismissed with prejudice  
13 as time-barred. *Salas*, C23-1022JNW-TLF, Dkt. ## 25, 26. This renders the instant  
14 petition second or successive under AEDPA. *McNabb*, 576 F.3d at 1030. Furthermore,  
15 Mr. Salas’s present double jeopardy claim could have been raised in his amended second  
16 petition. *See McNabb*, 576 F.3d at 1029. Accordingly, Magistrate Judge Leupold  
17 properly concluded that Mr. Salas’s instant petition is a successive petition. (*See R&R* at  
18 5, 7.)

19 Before filing the instant successive petition in this court, Mr. Salas was required to  
20 obtain an order from the Ninth Circuit Court of Appeals authorizing the district court to  
21 review the petition. 28 U.S.C. § 2244(b)(3); *Woods*, 525 F.3d at 888. He has not done  
22 so. (*See generally* Dkt.) The court therefore lacks jurisdiction to consider the instant

1 petition. *Burton*, 549 U.S. at 157. Accordingly, the court dismisses Mr. Salas's  
2 unauthorized successive § 2254 petition without prejudice. Mr. Salas may file a new  
3 habeas action that includes the same claim at issue in the instant petition if he first obtains  
4 permission from the Ninth Circuit to file a successive petition. *See* 28 U.S.C.  
5 § 2244(b)(3).

6 The court also agrees with Magistrate Judge Leupold's conclusion that the court  
7 should deny Mr. Salas a certificate of appealability. (*See* R&R at 6-7.) When a district  
8 court enters a final order adverse to the petitioner in a habeas proceeding, the petitioner  
9 must obtain a certificate of appealability in order to appeal the final order. 28 U.S.C.  
10 § 2253(c)(1)(A). A certificate of appealability is appropriate only where the petitioner  
11 makes "a substantial showing of the denial of a constitutional right." *Miller-El v.*  
12 *Cockrell*, 537 U.S. 322, 336 (2003). Under this standard, the petitioner must demonstrate  
13 that "jurists of reason could disagree with the district court's resolution of his  
14 constitutional claims or . . . or conclude the issues presented are adequate to deserve  
15 encouragement to proceed further." *Id.* at 327. Because reasonable jurists could not  
16 disagree that the instant petition is second or successive or that it should be dismissed for  
17 lack of jurisdiction, Mr. Salas is not entitled to a certificate of appealability.

#### 18 IV. CONCLUSION

19 For the foregoing reasons, the court hereby ORDERS as follows:

20 (1) The court ADOPTS the report and recommendation (Dkt. # 5) in its entirety;

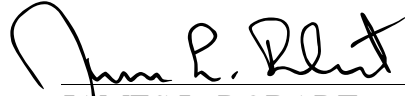
21 (2) The court DISMISSES Mr. Salas's § 2254 petition (Dkt. # 4) and this action

22 without prejudice for lack of jurisdiction;

1 (3) A certificate of appealability is DENIED; and

2 (4) The court DIRECTS the Clerk to send copies of this order to Mr. Salas, to counsel  
3 for Defendant, and to Magistrate Judge Leupold.

4  
5 Dated this 28th day of March, 2025.

6   
7 JAMES L. ROBART  
United States District Judge